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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 228

NYE & NISSEN (A CORPORATION), AND ABRAHAM MONCHARSH,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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The petitioners, Nye & Nissen, a California corporation, and Abraham Moncharsh, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, which affirmed a conviction of the petitioners for a conspiracy to defraud the United States (18 U.S.C. 88) and the filing of six false claims with an agency of the United States (18 U.S.C. 80).

Opinion Below

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit has not yet been officially reported but is included in the record at pp. 4602 to 4628.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on June 21, 1948. A petition for rehearing was filed on July 19, 1948, and denied on July 20, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules 37 (b) and 45 (a) of the Federal Rules of Criminal Procedure.

Questions Presented

1. May the doctrine of vicarious liability as set forth in *Pinkerton* v. *United States*, 328 U. S. 640, be employed by an Appellate Court to sustain a conviction on substantive counts following a conspiracy count where the cause was submitted to the jury on a different theory and where the jury was not directed to make findings of fact as to (a) whether the conspiracy was in existence at the time the substantive offenses were committed; and (b) whether the substantive offenses were committed in furtherance of the conspiracy or the object of it?

2. Whether evidence of other offenses similar to those described in the substantive counts can be properly considered by a jury for the purpose of determining the intent with which petitioner Moncharsh supposedly committed the substantive offenses where there was no evidence of his participation in any of the offenses or his aiding and abetting thereof on the theory that the doctrine of the *Pinkerton* case imposes liability upon him for their commission, when the substantive offenses were not submitted to the jury on

the *Pinkerton* rule, but with specific instructions that evidence of participation or aiding and abetting must be found before a verdict of guilt could be returned.

3. Whether there was a prejudicial variance in the proof between the conspiracy charged and that proven, in that the evidence tended to show the existence of two conspiracies of different character, involving different persons.

4. Whether the conspiracy count was duplicitous in that a conspiracy to defraud the inspection system of the War Shipping Administration and the Army and Navy was alleged to have commenced on January 1, 1938, whereas the War Shipping Administration was not created until February 7, 1942.

Statutes Involved

"Sec. 80. (Criminal Code, section 35, amended) Presenting false claims: aiding in obtaining payment thereof. Whoever shall make or cause to be made or present or cause to be presented, for payment or approval to or by any person or officer in the civil, military or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or by any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or cause to be

made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, shall be fined not more than $10,000 or imprisoned not more than ten years or both."

"Sec. 88. (Criminal Code, section 37.) Conspiring to commit offense against United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

"Sec. 550. (Criminal Code, section 332.) Principals' defined. Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

Statement of Facts

The trial of this case covered almost three months, resulting in a record of some 4,600 printed pages. A publication of the Department of Justice refers to it as "* * * the longest trial of a criminal case ever tried in California." (Bulletin, Criminal Division, Department of Justice, Vol. 7, No. 14, July 12, 1948). Accordingly, it is desired to comply with the rule of this Court in summarily setting forth a brief recitation of the facts in enough detail to substantiate the questions of law presented by this petition.

A seven count indictment was filed in the District Court of the United States for the Northern District of California, Southern Division, in June, 1945, against Nye & Nissen, a California corporation, and Abraham Moncharsh, the President of the Company, and three others who were employees, charging a conspiracy to defraud the United States (18

U. S. C. 88) and the filing of six false claims with an agency of the United States (18 U. S. C. 80) (R. 2-26). Upon trial, petitioners and two other defendants were found guilty on all seven counts (R. 4415). Petitioner Moncharsh was sentenced to two years imprisonment and $5,000 fine on the conspiracy count. On the six substantive counts he was sentenced to five years imprisonment and $5,000 fine on each count, the sentences to run concurrently (R. 79-80). The Company received a fine of $5,000 on each of the seven counts (R. 77-78). On appeal, the judgment of convictions was affirmed (R. 4629).

The first count of the indictment charged that beginning January 1, 1938, and up to the date of the return of the indictment, June 20, 1945, petitioners and the three other defendants conspired together with a named but unindicted co-conspirator to defraud the United States, by grading, weighing, packing, selling and delivering to the United States of America—War Shipping Administration, War Department and Navy Department, inferior products through frauds practiced upon inspectors of those departments, by defeating the lawful functions of these departments in the inspection system and by evading standards, grades, weights and specifications by means of false inspection. Five overt acts were specified (R. 2-10). None of the overt acts were charged as substantive offenses. None of them recited the filing of a false voucher with an agency of the Government.

In addition to the conspiracy count, there were six separate counts (Count II to Count VII) which charged that on certain dates in April and May 1944, the defendants caused false vouchers to be filed with the War Shipping Administration in violation of 18 U. S. C. 80 (R. 10-26).

Nye & Nissen was a business firm which had engaged for about 50 years in the sale of eggs, butter, cheese and poultry

feeds[1] (R. 4115). A small part of the business consisted in the sale of butter, eggs and cheese to the Army and Navy. For many years a large volume of business was transacted with private shipping companies, such at Mattson Navigation Company, American President Lines, and others. The War Shipping Administration was not in existence at the time of the alleged instigation of the conspiracy. On February 7, 1942, the War Shipping Administration was created by Executive Order No. 9054, (50 U. S. C. A., App. 1295). Thereafter, many of these companies became agents of the War Shipping Administration and Nye & Nissen continued its original course as a supplier of the aforementioned commodities to said shipping companies.

The Company operated various plants in California, Utah and the State of Washington (R. 4038). About 80% of its sales were made from plants other than the San Francisco plant, the subject matter of this controversy, (R. 4428-9), and to which the evidence of this case related only.

Moncharsh was the President of this Company, having charge of the acquisition of its finances, the procurement of commodities for sales, as well as general supervision on such matters of the Company's activities. He was far removed, not only from individual shipment of merchandise, but generally from that part of the business connected with sales to ocean going vessels, including those lines hereinbefore specified and those which received merchandise, the subject matter of the invoices involved in the substantive counts (R. 4059-60, 4233). One officer of the company, namely, John J. Smith, Vice President of the Company, devoted particular attention to sales to the shipping companies (R. 4231-32, 4240). He personally had direct charge of the business from such companies as Mattson Navigation Company and American President Lines for over twenty-

[1] In the period 1938-1944, the Company sold 2,007,814 cases of eggs and 37,287,508 pounds of butter and cheese to all of its trade (R. 4265-6).

five years, and Moore-McCormack Steamship Company for at least eight or ten years prior to the trial (R. 4240). Purchase orders did not pass through the hands of Moncharsh and "he would never see them" R. 4233). Smith was not indicted. He testified as a defense witness and was not cross-examined at all by the Government (R. 4226-60). He described Moncharsh as the "executive of the organization" (R. 4228). Naturally, Moncharsh was required to do a very considerable amount of traveling for business purposes and while familiar with the corporation business, could not possibly have had any knowledge of all the details of the employees' operations.

The gist of the conspiracy was the circumvention of the Government's inspection system required for the purchase of butter, eggs and cheese for the Army, Navy and War Shipping Administration. There was no inspection required of products sold to War Shipping Administration until January of 1944 (R. 864). There was no proof offered that its inspection system was ever circumvented at any time. The sole subject matter of the substantive counts had reference to filing of invoices for these commodities with War Shipping Administration only.

The evidence adduced by the Government in support of the charged conspiracy was based principally on the testimony of two former employees (R. 444-536, 777-1307, 3219-3337). They related instances of alleged acts on the part of several defendants, tending to show a circumvention of proper inspection of Army and Navy purchases. Their testimony had no relation whatsoever to the purchases made by War Shipping Administration. They testified as to events that occurred during the years 1939 through 1942. One of them was dismissed in a controversy in 1940 and the other on a later date in 1942. Their testimony was supported in part by several female employees who were formerly employed as egg candlers at the main plant at

San Francisco. This testimony, if credible, was sufficient in the Appellate Court's opinion to implicate Moncharsh as a participator in a plan to avoid the inspection system required by the Army and Navy during that period of time.

The record discloses no evidence, nor was any proof offered, that inferior products were sold to either the Army or Navy during this period of 1939 to 1942 inclusive, either as a result of these purported frauds or otherwise.

The evidence relating to the years 1943 and 1944 was of an entirely different character. This evidence did not relate to any frauds upon the inspection system. The gravamen of the offenses now shifted to evidence of deliveries of specific commodities to the War Shipping Administration alone, with claims that the commodities were below specification in quantity and quality. We believe it further vitally important to point out that during this latter period, to wit, from 1943 to 1944 inclusive, there was no evidence of any activity on the part of Moncharsh involving him in any fraudulent conduct, nor were any facts adduced from which any such inference of fraud might be drawn.

We merely indicate the type of proof with the following: for the entire year 1943 the evidence shows that a small delivery of 45 cases of eggs was made to a ship operated by American President Lines on behalf of War Shipping Administration, which eggs were found to be in poor condition approximately a week after their delivery on board ship. An adjustment was made in this instance whereby a credit was issued for approximately 36 cases of these eggs and a quantity of butter, which was taken off the ship in a rancid condition, was also credited, even though the duly authorized representative of the steamship company upon examination himself, found that its condition was not due in any manner to fraud or fault on the part of petitioner, but on the contrary was due to poor refrigeration on board the vessel itself (R. 4175-76, 4778-79). The Government

aduced evidence from which inferences could be drawn that the eggs were of a lower quality than that called for by the orders of the contractors. However, the evidence clearly shows that Moncharsh had no connection with that part of the business, other than in the absence of the Vice President, Smith, he responded to the telephone inquiry when the complaint was registered (R. 4073-74, 4125). His only offense was to immediately issue orders to his subordinates to check the matter, determine the facts and make adjustments (R. 4074).

Next, in April and May 1944, there were 15 separate deliveries to merchant ships operated on behalf of War Shipping Administration by private steamship companies, wherein the type and quality of eggs delivered was found to be inferior to that specified in the invoice; in two deliveries there was a discrepancy in the weight of cheese amounting to about 128 pounds. Six of these deliveries became the basis of the substantive counts in the indictment. There was no proof whatsoever of any circumvention of the inspection system in connection with these sales. The important fact is this: there was no evidence with respect to these substantive counts or to any of these transactions from which an inference could be drawn that petitioner Moncharsh knew of, participated in, directed, aided, abetted, counseled or procured the filing of the false vouchers accompanying the deliveries (see Appendix A). As we have noted, as President of the Company, Moncharsh was far removed not only from the individual shipments, but generally from that part of the business connected with sales to steamship companies. It appeared that the deliveries were made principally by one truck driver acting under instructions of two of the defendants who were employees of the Company.

In December 1944, following a delivery of some 400 cases of eggs to a War Shipping Administration ship, some of

them were found in poor condition after the ship was at sea about two weeks after the eggs were delivered, and some layers of eggs were missing in some of the cases. There was no evidence tending to show that the condition of the eggs was due to any fraud upon the part of inspectors, or that it was the fault of the vendor company, nor did the proof implicate any of the defendants.

The foregoing substantially outlines the facts of this case.

The lack of any evidence connecting Moncharsh with the substantive offenses was recognized by the prosecution in its summation to the jury. The prosecution contended that Moncharsh was responsible for the commission of these offenses, relying solely on the fact that he was the President of the Company (R. 4492, 4503, 4577-78). However, the learned trial Judge in submitting the case to the jury, correctly instructed them that "the mere fact that one is an officer or an employee of a corporation does not render him criminally responsible for the acts of other officers, agents or employees of the corporation, unless the evidence establishes beyond a reasonable doubt not only that he knew of such acts but that he actually participated or aided in the performance of the same with the specific intent to defraud and deceive in the manner alleged in the indictment." The jurors were specifically charged that unless the prosecution proved beyond a reasonable doubt that the defendants participated in or aided or abetted the substantive offenses, then a verdict of acquittal would have to be returned (R. 4366-67, 4368). Nevertheless, a verdict of guilt was returned against petitioner Moncharsh on these counts, on which he received a sentence of five years imprisonment and a total fine of $30,000.

In affirming the verdict of guilt on these counts, the Appellate Court took the position that the jury could properly find Moncharsh guilty as an aider and abettor under the rule of *Pinkerton v. United States*, because in

the Appellate Court's view the substantive offenses were committed in furtherance of the conspiracy of which he was a member (R. 4616-4619).

Specifications of Error to Be Urged

The Circuit Court of Appeals erred:

1. In holding that the conviction of Moncharsh for the offenses charged in the six substantive counts, viz., the filing of false vouchers with an agency of the Government was proper under the rule of the *Pinkerton* case.

2. In holding that it was proper under the rule of the *Pinkerton* case to permit the jury in its consideration of guilt or innocence of petitioner Moncharsh on the substantive counts to consider evidence of other offenses with which Moncharsh had no part, for the purpose of determining intent where there was no evidence that he participated in the commission of or aided and abetted the crimes charged in those counts.

3. In holding that there was no fatal variance between the conspiracy as charged in the indictment and that proved by the evidence.

4. In holding that the conspiracy count was not duplicitous.

Reasons for Granting the Writ

In holding that Moncharsh could be properly convicted for the six substantive offenses by reason of the application of the rule of the *Pinkerton* case, the Circuit Court of Appeals has decided a Federal question in such a manner as to conflict with applicable decisions of this Court.

The Circuit Court of Appeals has misapplied the *Pinkerton* case to this one and in so doing has committed grave

error. First, the trial Court submitted the substantive counts to the jury under the following instructions as to the law to be applied:

"I instruct you that in connection with counts two to seven, inclusive, that the mere fact that one is an officer or employee of a corporation does not render him criminally responsible for the acts of other officers, agents or employees of the corporation, unless the evidence establishes beyond a reasonable doubt not only that he knew of such acts but that he actually participated or aided in the performance of the same with the specific intent to defraud and deceive in the manner alleged in the indictment.

The defendants are here charged only with those things which are set out in Counts I to VII, inclusive, of the indictment. They are not to be tried upon any other issue.

In order to sustain a conviction of any defendant on any of the substantive counts, the Government must prove beyond a reasonable doubt each and every material allegation of such counts.

The Government must prove beyond a reasonable doubt:

First, that the invoices described in the substantive counts are in fact fraudulent and fictitious,

Second, that the defendants knew such invoices were at the time fraudulent and fictitious,

Third, that the invoices pertained to matters within the jurisdiction of a department or agency of Government,

Fourth, that the defendants intentionally used or caused to be made and used false and fictitious invoices in the manner set forth in the indictment, and

Fifth, that the defendants in using the invoices at that time, did so with criminal intent, that is to say with the intent to defraud and deceive.

Failure to prove any one of these five essential elements beyond a reasonable doubt as to any or all

of the defendants will entitle such or all of the defendants to an acquittal at your hands."

. . . . . .

"In determining whether each of the defendants made or used these invoices, or caused them to be made or used, it is not required that you find that each defendant saw or handled the invoices or were present when they were made. One who aids, abets, counsels, commands, induces, or procures the commission of an act is as responsible for that act as if he committed it directly. Consequently, if you find that one or more of the defendants aided, induced, or otherwise procured the making or using of these invoices, then you must find that they caused them to be made or used within the meaning of the statute" (R. 4366-67, 4368).

The admitted fact is that there was absolutely no evidence from which the jury could draw an inference of participation in or aiding and abetting of the substantive offenses on the part of Moncharsh. Thus, there was a lack of any factual findings upon which the jury could return a verdict of guilt under the instructions as noted above. Nevertheless, the rule of the *Pinkerton* case was advanced by the Government in justification of this verdict for the first time in the Appellate Court where it was adopted.

There is a substantial distinction between this case and the *Pinkerton* case, which the Appellate Court has failed to consider. For in the *Pinkerton* case, even though the substantive offenses were charged as overt acts in a conspiracy count, the trial Court submitted them to the jury with the specific charge that the jury must make definite findings of certain facts, to wit, (a) that the acts committed in the substantive offenses were in furtherance of the objects of the conspiracy; and (b) were committed during its existence, before a verdict of guilt could be returned against one who played no actual part in the com-

mission of the offenses. That charge was quite different than the charge in this case and outlined a wholly different rule of law. This Court, in its consideration of the *Pinkerton* case, pointedly noted that charge (328 U. S. 640, 645, 646, footnote 6):

> "'[6] The trial court charged: '. . . after you gentlemen have considered all the evidence in this case, if you are satisfied from the evidence beyond a reasonable doubt that at the time these particular substantive offenses were committed, that is, the offenses charged in the first ten counts of this indictment if you are satisfied from the evidence beyond a reasonable doubt that the two defendants were in an unlawful conspiracy, as I have heretofore defined unlawful conspiracy to you, then you would have a right, if you found that to be true to your satisfaction beyond a reasonable doubt, to convict each of these defendants on all these substantive counts, provided the acts referred to in the substantive counts were acts in furtherance of the unlawful conspiracy or object of the unlawful conspiracy, which you have found from the evidence existed.' Daniel was not indicted as an aider or abettor (see Criminal Code, § 332, 18 U.S.C. 550), nor was his case submitted to the jury on that theory."

Mr. Justice Douglas in delivering the opinion of this Court, recognized the theory of law upon which the trial Court had submitted the substantive counts. Thus, he stated:

> ". . . The question was submitted to the jury on the theory that each petitioner could be found guilty of the substantive offenses if it was found at the time those offenses were committed petitioners were parties to the unlawful conspiracy and the substantive offenses charged were in fact committed in furtherance of it" (328 U. S. 640, 645).

The importance of these findings by the jury before guilt could be determined was further emphasized by this Court in the observation of the majority opinion as follows:

> "A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement" (328 U. S. 640, 647).

Thus, we find, that what was present in the *Pinkerton* case is lacking in this case, namely, a finding by the jury beyond a reasonable doubt that (1) the unlawful conspiracy was in existence at the time the substantive offenses were committed; and (2) that the substantive offenses were acts in furtherance of that conspiracy or the object of it.

The Circuit Court of Appeals, however, has evidently attempted to itself supply the deficiency of the jury finding by substituting its own findings of fact in order to bring this case under the rule of the *Pinkerton* case, in disregard of the fundamental principle, that it is the function of the jury to determine the facts on proper instruction from the Court and not that of the reviewing Court to supply such finding. For the Circuit Court of Appeals states:

> "Since the evidence *justifies* a finding that the substantive offenses which are the subjects of Counts II through VII were committed in furtherance of a continuing conspiracy of which Moncharsh was a member, it should follow that the evidence is also sufficient to support a finding of Moncharsh guilty on those counts under the rule in *Pinkerton* v. *United States*, 328 U. S. 640" (R. 4616). (Italics ours).

The Circuit Court of Appeals has completely failed to recognize that Moncharsh has a right to have those factual issues determined by the jury, which if it had been so requested, might well have acquitted him on all six counts.

Certainly it was not the prerogative of the Appellate Court to arrive at the findings in its attempt to apply the rule of the *Pinkerton* case. For in so doing, the Circuit Court of Appeals has not only invaded the province of the jury, but it has engaged in a practice which has been condemned by this Court in a number of recent decisions, namely, spelling the guilt of Moncharsh from the record. *Bollenbach v. United States*, 326 U. S. 607 (1946); *Kraus & Bros. v. United States*, 327 U. S. 614 (1946); *Bihn v. United States*, 328 U. S. 633 (1946); *Kotteakos v. United States*, 328 U. S. 750 (1946).

It is evident, therefore, that the only basis for affirming the conviction of Moncharsh for these substantive crimes is a rule of law adopted by the Appellate Court upon which the jury was not instructed and which rule of law requires *specific findings of fact by a jury before it can be applied.* The error is not a technical one. *Bollenbach v. United States*, 326 U. S. 607 (1946); *Kraus & Bros. v. United States*, 327 U. S. 614 (1946); *Bihn v. United States*, 328 U. S. 633 (1946); *Kotteakos v. United States*, 328 U. S. 750 (1946). Nor is the error an academic one.[2] It is as vital as an error could be. Petitioner Moncharsh has suffered a deprivation of his constitutional right to a trial by jury in accordance with due process of law.

The argument resolves itself into a simple but highly important issue. It is this: is it necessary for factual findings to be made that (1) a conspiracy was in existence at the time the substantive offenses were committed to which

[2] Moncharsh received a sentence of 5 years imprisonment and $5,000 fine on each of the six counts, the sentences to run concurrently with the sentence of 2 years and $5,000 fine on the conspiracy count.

Moncharsh was a party; and (2) that the substantive offenses were committed in furtherance of that conspiracy, before guilt can be imposed upon him for the offenses committed by other alleged members of the conspiracy, where there was no evidence that he participated in, aided, abetted, counseled, commanded, induced or procured the commission of those offenses?

If the answer to the query is in the affirmative, as we believe it must be, then the next query is this: by whom must those facts be found?

We believe the answer to this question is self-evident—it is the function of the jury and the jury alone. That was what was *not* done in this case and for that reason the Circuit Court of Appeals has misapplied the decision of this Court in *Pinkerton* v. *United States*.

The logical result of the decision below would be to discard the necessity for a jury to find the essential facts referred to above before the vicarious liability for criminal offenses of another can be imposed upon one who neither participated in them, knew of them, or aided and abetted in their commission. We recognize that the doctrine of the *Pinkerton* case lays down a far reaching rule. We believe, however, that it was not the intention of this Court to extend the doctrine of vicarious liability or constructive guilt to the length to which the Circuit Court of Appeals has gone in this case. To allow the decision of the lower Court to stand would be to create a dangerous precedent in depriving petitioner Moncharsh of his right to due process of law.

A different situation might arise if the Circuit Court could correctly state that the jury in concluding guilt of Moncharsh on the conspiracy count must have found that the conspiracy included as its object, and in their furtherance, the very acts the commission of which constitute the substantive offenses set forth in Counts II to VII. But

such is by no means true. The jury could have found guilt on the conspiracy count not alone without such affirmative findings as to the objects and length of or period of termination of the conspiracy but without considering such matters at all.

To approve of the Appellate Court's judgment and opinion in this case, would be equivalent to approving finding guilt of an individual without the jury's finding the facts and circumstances necessary to support their verdict. There would seem to be no escape from the conclusion that such actually happened in this case. Guilt cannot be presumed; it cannot be found through the application of theory only; it must be established by the findings of fact necessary to support the theory applied and such facts must be so found by that agency designated by the law for such purpose, viz., the jury and not the Appellate Court.

It is for such reason we earnestly contend that a failure to review, reverse or modify the Appellate Court's holding herein would leave the doctrine of the *Pinkerton* case extended and would establish an evil precedent, inviting mischief and results harmful to proper administration of our federal criminal law.

2. As a consequence of its original error in applying the rule of the *Pinkerton* case to hold petitioner Moncharsh criminally responsible for the substantive offenses, the Circuit Court of Appeals has fallen into another error prejudicial to him. At the conclusion of the Government's case, the Government moved to make all evidence relating to deliveries of eggs on ships other than those mentioned in substantive counts, applicable to all the substantive counts as similar offenses for the purpose of demonstrating intent, except the evidence relating to the delivery of eggs to a merchant ship in December 1944 (R. 3342). The motion was opposed at that time and was not granted (R. 3343

3361). This motion was again renewed at the conclusion of all the evidence in the case and granted (R. 4354-55).

In submitting the case to the jury, the trial Court gave the following instruction:

> "Testimony has been introduced by the prosecution which it is claimed tends to show the commission of other acts or offenses by the defendant similar to that charged in the indictment. I charge you that this evidence was admitted for the sole purpose of proving guilty intent, motive, or guilty knowledge of the defendant, and that it can be considered by you for no other purpose" (R. 4377).

As we have pointed out above, there was no evidence whatever that Moncharsh had any part in the substantive offenses, or in the other offenses of similar nature. In short, the only transaction relating to "delivery of eggs on ships other than those mentioned in substantive counts" with which petitioner Moncharsh had any relation, was the S. S. William Clark incident in 1943; and, as we have noted, his only contact in that connection was to answer a telephone call originally placed for Smith, receive the complaint from the steamship company, immediately direct consideration of the complaint, and eventually to amicably adjust the matter. The only theory upon which these other offenses were submitted to the jury was for the purpose of ascertaining the intent with which the substantive offenses were committed.

It was properly argued in the Court below that petitioner Moncharsh was entitled to have the admissibility and application of this evidence determined as to him alone as distinguished from any other person. It was further stated that there was no case holding that the acts of other persons in which a defendant did not participate could be admitted and considered to determine the defendant's intent to com-

mit offenses in which he played no part. The Circuit Court of Appeals, nevertheless, dismissed that argument substantially in the following manner:

> ". . . Specifically, the argument made here is that the prior similar offenses cannot be considered as evidence of Moncharsh's guilt under the substantive counts, since Moncharsh was not shown to have had any connection with them. This contention ignores the evidence indicating that Moncharsh participated in a conspiracy, in furtherance of which the acts charged in the substantive counts and the prior offenses were committed. This evidence establishes Moncharsh as an instigator of such acts and offenses, which thereby became admissible against him in determining his guilt under the substantive counts. Pinkerton *v.* United States, 328 U. S. 640." (R. 4627).

We believe that the non-application of the *Pinkerton* rule to this case has been cogently outlined in our discussion under the foregoing point and accordingly, the language of the Court of Appeals in this instance needs no analysis to demonstrate the error in that respect. The prejudice created by permitting the jury to consider this evidence in the manner permitted by the trial Court, is self-evident.

3. The conspiracy as charged in Count I of the indictment was alleged to be a continuing one, in operation from January 1938 to June 20, 1945 (R. 2-10). At the close of the Government's case, a motion for a directed verdict was made as to the conspiracy count on behalf of petitioners herein, for the reason *inter alia* that there was a fatal variance between the charged conspiracy and the proof thereof (R. 3354-3361). The motion was denied (R. 3362). In consideration of this point on appeal, the Circuit Court of Appeals prefaced their affirmance of the trial Court's action with the observation that:

> ". . . Since the acts connecting Moncharsh with the conspiracy occurred mainly in the period before 1943,

> it is doubtful whether such a variance, if it exists, could be treated as immaterial under Berger v. United States, 295 U.S. 78."

However, in its view, the evidence supported the charge of a continuing conspiracy, and the Circuit Court of Appeals held that:

> ". . . All misconduct of defendants was germane to one consistent and persistent course of wrongdoing."

Quite to the contrary, we believe that a variance exists and that it was a material one. The motion should have been granted.

First, it must be noted that the only evidence from which an inference of misconduct on the part of Moncharsh could be drawn did not go beyond the year 1942. As we have stated *supra* (see Statement p. 7), the evidence for the entire period prior to 1943 was essentially based on the testimony of two ex-employees of the company and related only to sporadic instances of purported interference with proper inspection of products designated for the Army and Navy only. There was not a whisper of false voucher. Indeed, the instances of these purported frauds were never sufficiently identified to enable either the Government or the defendants to come forward with the documents covering them. Furthermore, there was no mention of the War Shipping Administration. The persons to whom this evidence related were occasionally Moncharsh and the three other personal defendants. The variance is clearly demonstrated when the evidence for the period 1943 to 1945 is examined. The Government's proof for this period of time no longer touched upon the impairment of the inspection system. It no longer concerned products destined for sale or actually delivered to the Army and Navy. Rather, it related only to the specific deliveries of eggs and cheese to certain merchant ships operated by steamship companies

as agents for the War Shipping Administration. The evidence was such as to permit an inference of fraudulent conduct on the part of only two of the defendants who were employees of the company. If anything, it was such as to permit an inference of a conspiracy to commit an offense against the United States, namely, the filing of false vouchers as described in 18 U.S.C. 80. There was no connection whatever as to type or persons between this evidence and the evidence concerning the activity of the defendants for the period prior to 1943 which related to purported circumvention of the inspection system of the Army and Navy.

Factually, the evidence for the entire period after 1942 related to one small delivery of 45 cases of eggs in November 1943 to the S. S. William Clark, deliveries to 15 merchant vessels in a seven week span in April and May 1944, and one delivery to a merchant ship in the summer of 1944, the latter incident devoid of evidence connecting any of the defendants with the delivery.

The character of the proof for the period 1943 and 1944 was wholly different than that for the preceding period. Nevertheless, it was detailed and in comparison with the evidence for the foregoing period, it was quite specific. It is consonant with the record to state that the jury might well have convicted Moncharsh on the conspiracy count wholly on the evidence adduced for this period of time; they might well have disbelieved the contradicted testimony of the Government's witnesses for the foregoing period but predicated their verdict solely on the evidence of the filing of false vouchers with the War Shipping Administration; that they might well have believed that there was no fraud committed in connection with the inspection of Army and Navy shipments but that there was fraudulent conduct on the part of two employees in connection with these War Shipping Administration transactions with which petitioner Moncharsh had no connection. Revert-

ing to the living scene, we observe that the jury, after retiring for its deliberation, returned with a request to the Court for a reading of certain testimony relating to the delivery of eggs on board one merchant vessel in May 1944 (R. 4387-4390). Quite obviously, the jury was interested in and impressed with that part of the Government's case relating to this period of time—that evidence which was not related to the entire line of proof for the period prior to 1943.

For the foregoing reasons, therefore, we believe that the variance existed and that it was a material one.

4. The War Shipping Administration was created by Executive Order No. 9054, on February 7, 1942 (50 U.S.C., App. 1295). Nevertheless, the conspiracy count of the indictment charged that "From about the 1st day of January, 1938 and continuing to and including the date of the return and filing of this indictment" (R. 4), the defendants agreed to defraud the United States by impairing and impeding the inspection system of the War Shipping Administration, War Department and Navy Department.

We believe that it is elementary that the gist of the offense of conspiracy is the unlawful agreement. Frequently, the offense is referred to as a "partnership in crime." It is essential, therefore, for the indictment to properly allege and describe the unlawful agreement or the terms of the so-called partnership in crime, whenever the offense is charged. We submit that a reading of the conspiracy count of this indictment, in the light of the fact which may be judicially noted, that the War Shipping Administration did not come into existence until 1942, clearly discloses the duplicity of which we complain. The unlawful agreement as charged in the indictment could not possibly have included within its terms or understanding, an agency of the Government which was not then in existence. To so hold

is to rely upon proof of what *was done* rather than what was agreed to be done by the alleged conspirators at the time the agreement was entered into.

Conclusion

For the foregoing reason, we respectfully submit the petition for a writ of certiorari be issued.

Respectfully submitted.

JOSEPH B. KEENAN,
HAROLD C. FAULKNER,
ROBERT T. MURPHY.

Dated: August ——, 1948.

APPENDIX A

The government's contention and theory of criminal liability is set forth in its summation to the jury. Record Volume XII—Page 4464-4506 and page 4570-4592. Moncharsh is referred to only a few times.

The alleged conspiracy is described as follows: R. Page 4475.

"In this type of case the apparent way the conspiracy would occur would be for the boss, the president, *Abraham Moncharsh*, to set up a certain standard, a certain method of doing business and to surround himself with subordinates who shall carry on that business in the way he wanted and to whom he would give general orders."

R. Page 4501.

"Now the last six counts I will cover in a hurry. They are substantive counts of the indictment and were drawn under a particular statute."

R. Page 4503 . . .

"There is no doubt that Berman caused his claims to be made and Goddard caused his, so, presumably, the only question in this case is, did Menges and did *Moncharsh* have any part in these claims. *Moncharsh* was the president, he was the director of the business policies. Whenever he was in town he was there at the plant; Mrs. McKenna so testified. He kept a close touch on the business affairs of the company and under those circumstances, isn't it self-evident that he originated or was responsible for all of these fictitious practices, and he was the one who was the guiding spirit? He it was who surrounded himself with these subordinates who would carry out his plans. Under those circumstances there can be no doubt that *Moncharsh* is equally guilty with Berman and is equally guilty with Goddard."

The foregoing is substantially the arguments made by Mr. Houck, Government Counsel in his opening summation.

The argument of the Senior Counsel for Government, Mr. Pratt, is found in Record 4570 to 4592.

We quote briefly from the following pages:

R. Page 4571.

"Mr. Houck in his argument yesterday adequately covered the conspiracy count and he left for me to some extent, at least, to dwell on these substantive counts."

R. Page 4577.

"Now, what is the responsibility of the other defendants than Berman and Goddard in connection with these particular counts? It is this: As far as the corporation is concerned, as was said to you yesterday by Mr. Houck, a corporation can act only through its officers and representatives. The pattern of this company's business was dictated by *Abraham Moncharsh*. There cannot be any question of that."

"As far as Menges is concerned, his duties related to the candling room. He was there for years and years. He knew the manner in which this business was being conducted in an improper way. He knew that Small eggs, Peewee eggs, cases of them were put over by Ruby Goddard's office. He knew the manner in which business was being conducted in that concern, and the law is that anyone who aids and abets the commission of an offense becomes a principal and is equally liable with any who actually perform the unlawful acts. *Moncharsh* is criminally responsible because he aids and abets everything that went on in that plant. He knew the pattern. He knew the course of conduct that was pursued, and the same is true of Menges. That is all I am going to say about those substantive counts."

From the foregoing it is apparent that the gravamen of the charge on the substantive counts against *Moncharsh* that he was president of the company. The evidence that he aided and abeted in the substantive counts comes from the assumption that he "aided and abeted everything," that occurred at the plant.

Certificate of Counsel

I, Joseph B. Keenan, do hereby certify that the foregoing petition, to the best of my knowledge and belief, is well founded in law and fact and is not interposed with the purpose of delay.

JOSEPH B. KEENAN.

Washington, D. C.
August 15, 1948.